9 PERC ¶ 16093

PLEASANT VALLEY SCHOOL DISTRICT

California Public Employment Relations Board

California School Employees Association and its Chapter #504, Charging Party, v. Pleasant Valley School District, Respondent.

Docket No. LA-CE-1706

Order No. 488

February 27, 1985

Before Hesse, Chairperson; Tovar and Jaeger, Members

Unilateral Change -- Reduction In Hours -- Adequate Opportunity To Bargain -- 09.651, 43.444, 72.613, 72.614, 72.666ALJ properly concluded that school district violated its duty to bargain in good faith by unilaterally reducing hours of two employees and increasing hours of four others without providing union with adequate notice and opportunity to bargain [see 8 PERC 15027 (1984)]. District's argument that business necessity justified unilateral modification in hours was not supported by sufficient evidence. Accordingly, by acting unilaterally prior to conclusion of bargaining process, district unlawfully refused to bargain in good faith.

Unfair Practice Procedures -- Post-Hearing Briefs -- Reply Briefs Precluded By Parties' Agreement -- 71.75 Where parties stipulated that post-hearing reply briefs would not be filed, ALJ did not err in holding school district to its agreement and refusing to permit submission of reply brief.

APPEARANCES:

> Patricia L. Roy, Field Representative, for California School Employees Association and its Chapter #504; The Negotiation Center, Edward M. Jones, for Pleasant Valley School District.

DECISION

HESSE, Chairperson.

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Pleasant Valley School District (District) to the proposed decision, attached hereto [see 8 PERC 15027 (1984)], of a PERB administrative law judge (ALJ). The ALJ found that the District had violated section 3543.5(c) and, derivatively, section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)1 by unilaterally changing the hours of work for instructional aides in November 1982, without negotiating with the California School Employees Association and its Pleasant Valley Chapter #504 (CSEA).

The Board has reviewed the ALJ's proposed decision in light of the District's exceptions and the entire record in this matter. Finding it free from prejudicial error, we adopt the ALJ's findings of fact and conclusions of law, consistent with the discussion below.

DISCUSSION

The Pleasant Valley School District's sole exception to the ALJ's proposed decision is to the finding that its duty to bargain reduction in hours was not excused by business necessity. The

District bases this exception on three grounds:

> 1. Because the District was denied the opportunity to file a reply brief to the Association's post-hearing brief, it was unable to rebut inaccurate evidence crucial to the proposed decision;
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> 2. Because of this denial, the ALJ was unable to fully comprehend the District's financial situation or the requirement for it to provide comparable services to its students; and
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> 3. The ALJ "only marginally applied" *NLRB v. Katz* (1962) 369 U.S. 736 to the case and that *Carlsbad Unified School District* (1/30/79) PERB Decision No. 89 was not applied at all.

The District also requests oral argument before the Board itself to further explain its business necessity defense.

We find no merit to the District's exception and arguments.

Reply Brief

PERB Regulations 32170(j) and 32212 require the ALJ to set a briefing schedule prior to the close of the formal hearing.2 The District admits that the parties agreed reply briefs would not be filed, although the ALJ gave them that option. The parties were then given 35 days after the receipt of the transcript to file their briefs. Nothing in the regulations provides a right to unilaterally repeal such an agreement.

The District contends that the CSEA brief contained "inaccuracies and distortions of facts and evidence that were perceived by the Respondent at the time of the pre-hearing to be incontrovertible." Although the District may not have liked CSEA's position, CSEA merely advocated *its* view of the facts and evidence. The District had the same right, which it, indeed, took full advantage of. The ALJ was not required to overturn the parties' previous agreement, and her refusal to accept the District's reply brief was not improper. This portion of the District's exception is, therefore, dismissed.

Business Necessity Defense

In asserting that its business necessity defense should be honored, the District states it had to change the hours of instructional aides because it had a $10,000 shortfall and because it had to provide comparable services to its students.

In this case, two aides had their daily work time reduced by two hours. Whatever savings this might have created does not excuse the District's failure to negotiate its proposed change in hours. The District, in its fiscal hardship discussion, overlooks that other employees had their hours increased from one-half to one and one-half hours per day. As the ALJ pointed out, a unilateral *increase* in hours is also a per se violation of the duty to bargain. *San Mateo County Community College District* (6/8/79) PERB Decision No. 94; *NLRB v. Katz* (1982) 369 U.S. 736 [50 LRRM 2177]. This portion of the District's exception is dismissed.

To excuse its failure to notify and negotiate with the exclusive representative, the District claims that it was not until September 1982, that it became aware that aides were working between two and five hours a day. The District's ignorance of its own operations, however, is no ground for exonerating it from its bargaining duties. Once the schedules were established, the District should have known the hours these aides would be working. At this point, the District was obligated to notify CSEA of its dilemma and begin negotiations.3

The District further urges that, because of the requirement that it provide comparable services to all students, it had to equalize the aide's hours. Every teacher had an aide and, because of the disparate number of hours being worked, some students received more time with an aide than did other students. The District and the El Rancho School Site Council were concerned that this

inequity would jeopardize the District's program because comparable services were not being provided to all the students. This belief is based on the assurances the District was required to make when it applied for the School Improvement Program.4

The aides' hours, however, were *not* equalized. While most aides worked three and one-half hours, others had three-hour workdays. Also, the El Rancho School Site Council and the District considered other options for providing comparable services besides the restructuring of hours. Thus, the District admits, in effect, that it was not absolutely necessary to equalize hours of these aides.

Sufficient evidence was presented at the formal hearing to support the ALJ's finding that the District unlawfully changed the hours of work of its aides, and to find that a business necessity defense was not present.

Katz and Carlsbad

The District bases its business necessity defense on *NLRB v. Katz* (1962) 369 U.S. 736 [50 LRRM 2177] and *Carlsbad Unified School District* (1/30/79) PERB Decision No. 89. In doing so, it misreads both cases.

The District relies on the following dictum to allow it to make unilateral changes in conditions of employment:

> While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here. (*NLRB v. Katz, supra,* at p. 748.)

Katz does not give the District license to make unilateral changes. The District overlooks the court's holding and admonition against making such unilateral changes.

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. *It will rarely be justified by any reason of substance.* It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of section 8(a)(5), without also finding the employer guilty of overall subjective bad faith. (*Katz, supra,* p.747.) (Emphasis added.)

The ALJ properly cited *Katz* for the proposition that a unilateral increase in working hours is a per se violation of EERA. Further, the ALJ properly relied on Board precedent in her determination of this issue. This argument is also dismissed.

The District next argues that it "took pains to describe the logic of utilizing the *Carlsbad* test for a 3543.5(c) allegation and the administrative law judge failed to make mention of that logic." The District relies on part four of the *Carlsbad* test which states:

> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available. . . . (*Carlsbad, supra,* at pp. 10-11.)

Carlsbad, however, is an "interference" case and inapposite to a "failure to negotiate" case. By contrast, the cases cited by the ALJ are more appropriate to the instant case than *Carlsbad.* Those cases also involved an employer's failure to negotiate unilateral changes; moreover, those cases recognized and discussed the business necessity defense. The ALJ adequately researched and applied the appropriate law in this area. Therefore, this portion of the District's exception is also dismissed.

In sum, we find that the District's exception and arguments are without merit.

The District also requested oral argument to explain its "business necessity" defense. Because the record before the Board is neither incomplete nor ambiguous, further presentations on the subject are not in order. As we see no point in delaying this matter further, the District's request for oral argument is denied.

ORDER

The Board hereby AFFIRMS the proposed decision in Case No. LA-CE-1706 and ADOPTS its remedy and order as that of the Board itself.

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Pleasant Valley School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act. Pursuant to section 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Pleasant Valley Chapter #504 as the exclusive representative of its classified employees by taking unilateral action on matters within the scope of representation, as defined in section 3543.2, specifically with reference to the decision to change the hours of work of employees.

(b) By the same conduct, denying to the California School Employees Association and its Pleasant Valley Chapter #504 rights guaranteed by the Educational Employment Relations Act, including the right to represent unit members.

(c) By the same conduct, interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Upon request of CSEA, meet and negotiate with CSEA over the decision and the effects thereof of the change in hours of the aides.

(b) Unless the parties reach a contrary agreement, the two employees whose hours were reduced should be made whole for any loss of economic benefits suffered as a result of the District's reduction in hours, with interest at the rate of 10 percent per annum from the date of the unilateral change (November 15, 1982) until the occurrence of the earliest of the following conditions:

> (1) the date the District and CSEA reach agreement;
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> (2) completion of the statutory impasse procedures;
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> (3) the failure of CSEA to request bargaining within 10 days following service of this Decision; or
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> (4) the subsequent failure of CSEA to bargain in good faith.
>
> (5) the point at which the parties have previously reached agreement or negotiated through the statutory impasse proceedings concerning the unilateral change in hours.

(c) Within 35 days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of 30 consecutive

workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.
(d) Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with his/her instructions.

Members Tovar and Jaeger joined in this Decision.

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[1] EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government Code.

Section 3543.5 reads, in pertinent part, as follows:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2] PERB Regulations are codified at California Administrative Code, title 8, sections 31001 et seq.

PERB Regulation 32170 provides in relevant part:

> The Board agent conducting a hearing shall have the powers and duties to:
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> . . .
>
> (j) Authorize the submission of briefs and set the time for the filing thereof.

PERB Regulation 32212 provides, in relevant part:

> Before the close of the hearing, the Board agent shall rule on any request to make oral argument or to file a written brief. The Board agent shall set the time required for the filing of briefs.

[3] Even if we were to find that the District's ignorance is a valid excuse, there was still sufficient time to confer with CSEA before issuing the October 13 notices. Failure to use this period for negotiations should not be excused by use of the business necessity defense. *Sutter Union High School District* (10/7/81) PERB Decision No. 175.

[4] The assurance is as follows:

> The district provides instructional materials for all students on an equitable per-pupil basis. (District's Exhibit N, item 10.)